No. 15,071

United States Court of Appeals

For the Ninth Circuit

MAUREEN GARDNER,

Appellant,

vs.

J. J. NEWBERRY CO., INC.,

Appellee.

Appeal from the United States District Court for the District of Idaho, Southern Division.

BRIEF FOR APPELLANT.

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JURISDICTION.

Jurisdiction is conferred by 28 U.S.C.A., section 1332. Allegations of existence of jurisdiction appear in plaintiff's amended complaint. (R. 3.) The facts disclosing the basis upon which it is contended that the trial court had jurisdiction are:

(1) Plaintiff is a citizen of Oregon. (R. 3.)

(2) Defendant is a citizen of Virginia, operating in the State of Idaho and engaged in the business of selling miscellaneous merchandise, including parakeets. (R. 3.)

(3) The amount in controversy is $3,500.00 (R. 5), exclusive of costs and interest. (R. 3.) The District Court found jurisdiction. (R. 7.)

Jurisdiction of the Circuit Court of Appeals is based upon the fact that on January 5, 1956 the trial court entered an order dismissing plaintiff's amended complaint and notice of appeal therefrom was filed on behalf of plaintiff-appellant on February 4, 1956. (R. 10.)

Jurisdiction of appeal for the case is conferred by 28 U.S.C.A., sections 1291, 1294 and 2107 and Rule 73 (RCP).

STATEMENT.

Appellant brings this action for personal injuries against appellee on breach of implied warranties growing out of the sale to her of a parakeet. She alleges, "defendant by so offering said parakeet for sale intended that said parakeet should and would be consumed and used by the purchaser and others as a pet. That defendant thereby impliedly warranted and represented that said parakeet was pure, harmless and wholesome and safe * * *; that said parakeet was impure, contaminated and infected * * * and not reasonably fit for the purpose for which it was purchased and would be used, and the same was not of merchantable quality; * * * and defendant then and there impliedly warranted the same to be in all respects fit and proper for the use described herein, and plaintiff relied upon said implied warranty but the same,

when sold to plaintiff, was unfit because of the psittacosis with which it was then infected." (R. 4.)

Appellant further alleged notice of the psittacosis in March, 1955 and the giving of oral notice to defendant of the breach of implied warranty. (R. 5.)

Appellee moved to dismiss the amended complaint (R. 6), and on January 5, 1956 the action was ordered dismissed. (R. 10.)

STATUTES INVOLVED.

The State statutes involved are those sections under the Uniform Sales Act of the State of Idaho, Title 64, Chapters 1-6, Idaho Code, set forth in the Appendix, infra.

The Uniform Sales Act became effective in Idaho on January 1, 1920, and is Chapter 149, p. 443, et seq., 1919 Session Laws.

QUESTION PRESENTED.

If, at the time of the sale, a parakeet is allegedly infected with psittacosis, does the purchaser thereof, who subsequently contracts the disease from the bird, have a cause of action against the seller thereof, upon the theory of breach of implied warranty of merchantability and unfitness for the purpose for which the parakeet was purchased.

SPECIFICATIONS OF ERROR.

I.

The Court erred in granting the motion of defendant-appellee to dismiss plaintiff-appellant's amended complaint.

II.

The Court erred in ordering on January 5, 1956, the dismissal of plaintiff-appellant's amended complaint.

III.

The Court erred in failing to deny defendant-appellee's motion to dismiss plaintiff-appellant's amended complaint.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

I.

Generally speaking, this Court is bound by law as declared by the Supreme Court of the State where the action arose.

Sanger v. Lukens (9th Cir.), 26 Fed. (2d) 855;
Lincoln Co. v. Huron Holding Corp. (9th Cir.), 111 Fed. (2d) 438;
Boise Payette Lbr. Co. v. Halloran (9th Cir.), 281 Fed. 818;
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188;
Standard Acc. Co. v. Winget (9th Cir.), 197 Fed. (2d) 97.

II.

Where the state decisions are in conflict or do not clearly establish what the local law is, the federal court may exercise an independent judgment and determine the law of the case.

Christian v. Waialua Agr. Co. (Hawaii), 93 Fed. (2d) 603, rehr. denied 59 S. Ct. 240, 305 U.S. 673, 83 L. ed. 436;

New York Life v. Ruhlin, 25 Fed. Supp. 65;

Ruhlin v. New York Life, 58 Sup. Ct. 860, 304 U.S. 202, 82 L. ed. 1290;

Hamilton v. Loeb, 179 Fed. (2d) 728, 186 Fed. (2d) 7;

In re Phoenix Hotel, 13 Fed. Supp. 229, 83 Fed. (2d) 724;

Bodenheimer v. Confed, Mem. Assn., 68 Fed. (2d) 507, affg. 5 Fed. Supp. 526;

Dernberger v. B. & O., 243 Fed. 155, 234 Fed. 405.

III.

In the absence of a decision laid down by the State Court, the Circuit Court will apply the rule previously made by it.

Hagan & Cushing Co. v. Wash. W. P. Co. (9th Cir.), 99 Fed. (2d) 614.

IV.

Judicial opinions are only authoritative on the facts on which they are founded, and general expressions

must be considered and construed in the light of this rule.

Bashore v. Adolf (Ida.), 238 Pac. 534;
Eldridge v. Black C. Irr. Co. (Ida.), 43 Pac. (2d) 1052;
Application of Kaufman (Ida.), 206 Pac. (2d) 528;
Pore, Inc. v. Comm. (Mich.), 33 N.W. (2d) 657;
U. S. v. One-Ford Two-Door (D.C. Ida.), 69 Fed. Supp. 417;
Bradshaw v. Seattle (Wash.), 264 Pac. (2d) 265, 42 A.L.R. (2d) 800.

V.

Stare decisis will not be applied in any event to perpetuate error.

State v. Ballance (N.C.), 51 S.E. (2d) 731, 7 A.L.R. (2d) 407;
Bank v. Doschades (Ida.), 279 Pac. 416;
Kerr v. Finch (Ida.), 135 Pac. 1165;
Dale County v. Brigham (Fla.), 47 So. (2d) 602, 18 A.L.R. (2d) 602;
Hanks v. McDanell (Ky.), 210 S.W. (2d) 784, 17 A.L.R. (2d) 1;
Woods v. Lancet (N.Y.), 102 N.E. (2d) 691.

VI.

Reasons for the doctrine of *stare decisis* are less strong in cases where vested property rights are not disturbed.

Bank v. Doschades (Ida.), 279 Pac. 416;
Kabatchnick v. Hanover-Elm Corp. (Mass.), 103 N.E. (2d) 692, 30 A.L.R. (2d) 918.

VII.

"The purchase of an animal with the knowledge of the seller that it is being bought for a particular purpose gives rise to a warranty of fitness for such particular purpose where the buyer relies upon the seller's skill or judgment that the animal is fit for such purpose."

46 Am. Jur. (Sales), Sec. 393, p. 567;
Moeckel v. Diesenroth (Mich.), 235 Pac. 157;
Snowden v. Waterman (Ga.), 31 S.E. 110;
Woolsey v. Ziegler (Okla.), 123 Pac. 164;
Trousdale v. Burkhardt (Iowa), 224 N.W. 93;
Alford v. Kruse (Minn.), 235 N.W. 903;
Barton v. Dowls (Mo.), 285 S.W. 988;
Renfrow v. Citizens' State Bank (Ind.), 158 N.W. 919;
Latham v. Powell (Va.), 103 S.W. 638.

VIII.

There not only can be an implied warranty in the sale of an animal or bird for the breach of which an action will lie, but also in such cases where the animal or bird is leased.

Idaho Code, Sec. 64-115;
Idaho Code, Sec. 64-309;
Idaho Code, Sec. 64-507;
Koser v. Hornbeck (Ida.), 265 Pac. (2d) 988.

IX.

Courts have, without hesitation, permitted recovery for breach of implied warranty in cases involving the sale of contaminated or impure food.

Vaccarino v. Cozzubo (Md.), 31 A. (2d) 316;
Pellettier v. Dupont (Md.), 128 A. 184;

Catalanello v. Cudahy, 27 N.Y.S. (2d) 637;
Ward v. Great Atlantic (Mass.), 120 N.E. 225;
Cheli v. Cudahy (Mich.), 255 N.W. 414;
Nelson v. West Coast Dairy (Wn.), 105 P. (2d) 76;
Williams v. Coca Cola (Ill.), 98 N.E. (2d) 164;
Amdal v. Woolworth (Iowa), 84 Fed. S. 657;
Vogel v. Thrifty Drug (Cal.), 272 P. (2d) 1;
Ryan v. Progressive Stores (N.Y.), 175 N.E. 105, 22 N.C.C.A. (N.S.) 573;
Klein v. Duchess Sand. Co. (Cal.), 86 Pac. (2d) 858.

X.

Courts have, without hesitation, permitted recovery for breach of implied warranty in cases involving the sale of wearing apparel.

Rogiers v. Gilchrest Co. (Mass.), 45 N.E. (2d) 744;
Barrett v. S. S. Kresge Co. (Pa.), 19 A. (2d) 502;
Payne v. White Co. (Mass.), 49 N.E. (2d) 425;
Zirpola v. Adam Hats (N.J.), 4 A. (2d) 73;
Ringstad v. Magnin & Co. (Wash.), 239 P. (2d) 848;
Deffebach v. Lansburgh & Bros., 150 Fed. (2d) 591, 12 N.C.C.A. (N.S.) 204.

XI.

Courts have, without hesitation, permitted recovery for breach of implied warranty in cases involving the

sale of various chattels, including rabbits infected with a contagious disease.

Haut v. Kleene (Ill.), 50 N.E. (2d) 855;

Bianchi v. Denholm & McK. Co. (Mass.), 19 N.E. (2d) 697;

Smith v. Burdine (Fla.), 198 So. 223;

Kruper v. P. & G. Co. (Ohio), 119 N.E. (2d) 605, 4 N.C.C.A. (N.S.) 709.

XII.

One purchasing food or other commodity for human consumption relies upon the wisdom of the seller as to the quality of the product, and this is a necessary inference from the relation of the parties.

Ward v. Great At. & P. Tea Co. (Mass.), 120 N.E. 225;

Ringstad v. Magnin Co. (Wash.), 239 P. (2d) 848;

Blanchard v. Kronick (Mass.), 169 N.E. 438.

XIII.

The purchaser should be protected for breach of implied warranty. The retailer may recoup from the manufacturer if there is liability.

Griffin v. James Butler Gro. (N.J.), 156 A. 636;

Higbee v. Giant Food Shop. (Va.), 106 Fed. Supp. 586;

Ryan v. Progressive Foods (N.Y.), 175 N.E. 105.

XIV.

Lack of knowledge at the time of the sale of the defect or unwholesomeness of the commodity on the part of the seller and purchaser is no reason to deny recovery to the purchaser on breach of implied warranty.

Bianchi v. Denholm (Mass.), 19 N.E. (2d) 697;
Young v. Great At. Pac. T. Co. (Pa.), 15 Fed. Supp. 1018;
Vaccarino v. Cozzubo (Md.), 31 A. (2d) 185;
Baum v. Murray (Wash.), 162 P. (2d) 801.

SUMMARY OF ARGUMENT.

I.

The case of *McMaster v. Warner* (Ida.), 258 Pac. 547, is not a precedent to be applied herein because the facts in the *McMaster* case and the case at bar are entirely dissimilar, and the Uniform Sales Act of the State of Idaho was not then in effect; hence, *Erie R. Co. v. Tompkins* is inapplicable.

II.

If there is any precedent to be applied, the latest expression of the Supreme Court as announced in *Koser v. Hornbeck* (Ida.), 265 Pac. (2d) 988 should be applied.

III.

On analogy of the food cases, in which recovery was allowed on breach of implied warranty, appel-

lant herein has stated a claim upon which relief may be granted.

ARGUMENT.

I.

The Honorable District Judge, in his order, was of the opinion that the case of *McMaster v. Warner* (Ida.), 258 Pac. 547, was decisive of this case, and that under the ruling of *Erie R. Co. v. Tompkins,* he was required to follow such case. In this, appellant does not concur.

The order cites as authority, 46 Am. Jur. (Sales), 393, to the effect that "caveat emptor" applied to the sale of animals, and there is no implied warranty of soundness, of freedom of disease, or of the breeding qualities of the animal sold, even though purchased for breeding purposes to the knowledge of the seller. Apparently, the Court overlooked the rest of the paragraph therein, as follows:

> "However, the purchase of an animal with the knowledge of the seller that it is being bought for a particular purpose gives rise to a warranty of fitness for such particular purpose where the buyer relies upon seller's skill or judgment that the animal is fit for such purpose. This rule applies to a purchase of animals with the knowledge of the seller that they are being bought for the purpose of immediate slaughter or resale after fattening by the buyer, or for the purpose of use as stock animals. This rule also applies to the purchase of a horse for the purpose of work

> or driving, and to the purchase of a cow for dairy purposes, and to the purchase of an animal for breeding purposes." (46 Am. Jur., Sales, Sec. 393.)

Referring specifically to the *McMaster* case, supra, it is not a precedent herein for the following reasons:

1. The animal sold did not apparently develop its defect until many months after the purchase.

2. The damages claimed were for infecting the remaining herd.

3. That the disease with which the animal was allegedly infected was not contagious.

4. "In this case we are dealing with a heifer purchased after and upon a personal inspection by the buyer."

5. The *McMaster* case does not deal with the sale of a commodity or chattel to be used by human consumption.

6. The Sales Act of the State of Idaho, under which the case at bar must be determined, was not in force at the time of the sale in the *McMaster* case, to-wit: January, 1919.

In the *McMaster* case it was observed:

> *"But in this case we are dealing with a heifer purchased after and upon a personal inspection by the buyer.* She dropped and nursed her calf, and upon this heifer, the infection complained of was not discovered until some eight or nine months after the sale. And here we are without opinion ventured by any of the veterinarians that

she was not sound at the time of the sale." (Italics ours.)

Accordingly, the statements in the *McMaster* case are pure dicta and unnecessary to the decision, because the buyer actually examined the animal before or at the time of the sale, and are not binding in the case at bar. Furthermore, there was no substantial evidence that the animal was not healthy at the time of the sale. Under the facts of the *McMaster* case, having made an inspection of the animal before the sale, there could be no reliance by the buyer upon the seller's skill or judgment, thus precluding application of implied warranties.

Where an authority is in point, this Court is bound by the law declared by the Supreme Court of the state where the cause of action arose (Propositions of Law I); however, where the state decisions are in conflict or do not clearly establish what the law is, this Court may exercise an independent judgment and determine the law of the case. (Propositions of Law II.) Where the precise point has not been determined, and the point is one of novel impression within the state, this Court should determine the principle of law involved with the aid of such persuasive authorities as are available (*Smith v. Penn. Cent. Airlines,* 76 F. Supp. 940, 6 A.L.R. (2d) 521; *Baruch v. Sapp* (4th Cir.), 178 Fed. (2d) 382), but it should not adopt general or loose language of one opinion and apply it to a case on dissimilar facts.

There is much general language in the *McMaster* case, completely unnecessary to the decision. "* * *

the generality of the language used in an opinion is always to be restricted to the case before the Court, and is only authority to that extent." (*Stark v. McLaughlin* (Ida.), 261 Pac. 244.)

There is a pronounced line of demarkation between what is said in an opinion and what is decided by it * * *" (*Bashore v. Adolf,* supra).

Judicial opinions are only authoritative on the facts upon which they are founded and general expressions (in an opinion) must be considered and construed in the light of this rule. (Propositions of Law IV.)

Judicial opinion should be considered only in reference to the particular case under consideration, and limited to those points raised by the record, considered by the Court, and necessary to the determination of the case. (*Stark v. McLaughlin* (Ida.), 261 Pac. 244; *Bashore v. Adolf,* supra; *North Side Canal v. Idaho Farms Co.* (Ida.), 96 Pac. (2d) 232.)

Thus, it is respectfully observed that the loose language used in the *McMaster* case was unnecessary to the opinion and ultimate outcome, and the same is not a precedent for the case under consideration, and that *Erie R. Co. v. Tompkins,* supra, is not applicable. In the absence of a state decision this Court can apply the law as it gleans the same to be.

II.

Should this Court decide that *McMaster v. Warner* is of some significance, and that the generalities stated therein are of some persuasion, then appellant sub-

mits that of equal dignity and weight are the observations in *Koser v. Hornbeck* (Ida. 1954), 265 Pac. (2d) 988, in which the Idaho Supreme Court, in passing upon a suit involving personal injuries arising out of the bailment of a horse, stated:

> "* * * one who lets a horse for hire, although not an insurer of the horse's fitness, is, under an obligation, sometimes spoken of as an implied warranty, to furnish an animal which is reasonably safe for the purpose known to be intended * * *."
>
> "It has been held that such an action may be brought either in contract for a breach of an implied warranty of fitness, or in tort for negligence in furnishing an unsafe animal."

The aforementioned are the *latest* expressions of that Court in the law of implied warranties, and if there is sound reason to apply such law to bailments, there is all the more reason to hold it applicable to a sale, as we have in this case.

If the *McMaster* case is a precedent, the Supreme Court of the State of Idaho said many years ago in relation thereto, "precedent is strongly persuasive with this court but not controlling, and if devoid of reason and justice, will not be followed." (*Kerr v. Finch* (Ida.), 135 Pac. 1165.)

Speaking of "stare decisis", the following quotations are, in appellant's opinion, particularly applicable:

> "The appellant relies strongly on the principle of stare decisis to maintain his position that the common law rule still exists undisturbed in Ken-

tucky. It must be admitted that stare decisis supports his position, but it seems to us the words of Mr. Justice Brandeis in State of Washington v. W. C. Dawson & Co., 264 US 219, 44 S. Ct. 302, 68 L. ed. 646, are applicable here:

> 'Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many.' "
>
> *Brown v. Gosser* (Ky.), 262 S.W. (2d) 480, 43 ALR (2d) 626.

"Notwithstanding the rule of stare decisis, or inclination to follow precedents, the courts have the power, and frequently exercise it, of departing from rules which have been previously established. The strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of stare decisis subordinate to legal reason and justice and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error. Accordingly, the authority of precedents must often yield to the force of reason and to the paramount demands of justice as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands."

14 Am. Jur. 341, Sec. 124 *Courts*;

Hanks v. McDanell (Ky.), 210 S.W. (2d), 784, 17 A.L.R. (2d) 1.

"Our court said, long ago, that it had not only the right, but also the duty to re-examine a ques-

tion where justice demands it * * *. That opinion notes that Chancellor Kent, more than a century ago, had stated that upwards of a thousand cases could then be pointed out in the English and American reports 'which had been overruled, doubted, or limited in their application', and that the great Chancellor had declared that decisions which seem contrary to reason 'ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired and the beauty and harmony of our system destroyed by perpetuity of error'. And Justice Sutherland, writing for the Supreme Court in Funk v. United States, 290 US 371, 382, 54 S. Ct. 212, 215, 78 L. ed. 369, said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.' No reason appears why there should not be the same approach when traditional common law rules of negligence result in injustice. * * *"

"The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that, see U. of Toronto LJ article, supra, p. 29, will serve: 'if that were a valid objection, the common law would now be what it was in the Plantaganet period'. We can borrow from our British friends another mot: 'When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.'

> * * * We act in the finest common law tradition when we adopt and alter decisional law to produce commonsense justice."
>
> *Woods v. Lancet* (N.Y.), 102 N.E. (2d) 691, 27 A.L.R. (2d) 1950.

It should be remembered that the case at bar is not dealing with a fixed rule of property and no vested rights can be impaired by ignoring the statements made in the *McMaster* case. Thus, the reasons for the doctrine of *stare decisis* are less strong in a case like the present than in one where rules of property are involved. (*Kabatchnick v. Hanover-Elm Corp.,* (Mass.), 103 N.E. (2d) 692; *First National Bank v. Schodes* (Ida.), 279 Pac. 416; *Hanks v. McDanell* (Ky.), 210 S.W. (2d) 784.)

III.

Assuming there is confusion in Idaho with reference to the law of implied warranty, then this Court is free to apply the law as consonant with good reason and logic, with particular reference to cases from other jurisdictions.

The cases from other jurisdictions involving denial of recovery or recovery on breach of contract growing out of the sale of animals are legion. For example:

An implied warranty that an animal sold is merchantable and reasonably suited to the use intended arises upon the sale thereof, and is breached where it is infected with the germs of a disease unknown

both to the seller and the buyer, which subsequently develops, causing the death of the animal.

Snowden v. Waterman (Ga.), 31 S.E. 110.

A warranty arising from representations made by the seller at the time of sale that a cow was a good milch cow implies the absence of any defect or disease which will impair the animal's natural usefulness for the purpose for which it is purchased, and it is breached by any defect which renders the animal permanently less serviceable, although the defect had not fully developed at the time of the sale.

Woolsey v. Ziegler (Okla.), 123 Pac. 164.

Implied warranty that the cow was fit for breeding purposes, was breached in sale by a breeder of cows of this kind to a buyer who stated that he desired to purchase the animal for this purpose; Uniform Sales Law applied.

Peterson v. Dreher (Iowa), 194 N.W. 53;
Trousdale v. Burkhardt (Iowa), 224 N.W. 93.

A breeder of registered Guernsey cows, who sells them to a purchaser with the knowledge that they are to be used for breeding purposes in building up a thoroughbred herd, and that his herd from which they are sold is infected with contagious abortion, or Bang's disease, the purchaser being ignorant thereof and supposing he is getting cows fit for putting into his herd for the purpose stated, is liable upon an implied warranty that the cows sold are fit for the purpose intended and are not infected with the disease.

Alford v. Kruse (Minn.), 235 N.W. 903.

The sale of hogs as breeding stock raised an implied warranty that the animals were fit for that purpose, which was breached where the hogs were infected with a contagious disease.

Barton v. Dowls (Mo.), 51 A.L.R. 494, 285 S.W. 988.

The sale of a car of live hogs, described as stock hogs, raises an implied warranty that the hogs shall be fit for stock purposes, which is breached by the hogs being unsound and apparently infected with a fatal disease.

Renfrow v. Citizens' State Bank (Ind.), 158 N.W. 919.

A sale of cattle for a purpose which the buyer communicated to the seller (to resell for feeding and fattening) raises an implied warranty that the cattle are fit for this purpose.

Lotham v. Powell (Va.), 103 S.W. 638.

In the cases of wearing apparel, recoveries have been denied and granted on breach of implied warranty. In *Zirpola v. Adam Hat Stores, Inc.* (N.J.), 4 A. (2d) 73, we find this statement:

> "It is well known that many people are immune from certain poisons as well as contagious and infectious diseases, yet it could not be contended by reason thereof that a vendor selling an article infested with disease germs or containing a poisonous substance injurious to the user of the article would not be liable under an implied warranty, unless it could be proved that injury would be the inevitable result of the use of such article

> * * * We think there was sufficient evidence to establish the fact that the poisonous dye was contained in the hat at the time of purchase, and as a result thereof plaintiff was injured."

A person buying a dress over a counter has a right to rely upon the implied warranty that it was fit to be worn, particularly when an inspection of the dress would not disclose unsound condition of the dress, and if she is injured by reason of breach of implied warranty, plaintiff may recover.

> *Payne v. R. H. White Co.* (Mass.), 49 N.E. (2d) 425;
>
> *Rogiers v. Gilchrest Co.* (Mass.), 45 N.E. (2d) 744.

An implied warranty, which would render the defendant seller of a dress liable for personal injuries sustained by the buyer because of the dyes in the dress, was held to be present, although the purchase was made directly from a rack of similar garments. The Court said:

> "We see no distinction in reasoning or principle between the present situation and the foodstuff cases, universally recognized as the subject of implied warranties of fitness for use for the purpose for which the materials or products are sold. Here are cheap garments manufactured and sold in lots of thousands. The manufacturers and retailers are obviously the only ones in a position to control and know the character and effect of the materials used in their manufacture, and no housewife can be expected to risk the chance of poisoning by a substance contained in

an ordinary article of clothing designed and sold expressly for human wear."

Barrett v. S. S. Kresge Co. (Pa.), 19 A. (2d) 502.

Where there was evidence that the plaintiff, not an expert in textiles, purchased a lounging robe made of materials which would burn up in an instant if they came in contact with flame and that the plaintiff was severely burned when she waved a match after lighting a cigarette, the robe being ignited thereby, it was held that the jury should have been instructed that if the robe caught fire and burned as the witnesses testified, there was a breach of implied warranty of fitness, and a directed verdict for the defendant was reversed.

Deffebach v. Lansburgh & Bros., 185 Fed. (2d) 591.

In many cases involving the sale of food which have arisen, the Courts have held or recognized that the circumstances of the sale may show an implied warranty that the article is fit for consumption, and that if it turns out to be unwholesome or poisonous, resulting in sickness of the buyer, the seller is liable either in tort or assumpsit for the injury thus resulting.

There is an implied warranty that food purchased for human consumption is reasonably fit for that purpose. (See Propositions of Law IX.)

Other than the wearing apparel and food cases, recoveries have been allowed.

An implied warranty of fitness, with resultant liability for injury to the plaintiff, was held to be present where the defendant sold face powder containing a substance known to be an irritant to "some" persons' skin, and the plaintiff was injured by use of such power.

Bianchi v. Denholm & McK. Co. (Mass.), 19 N.E. (2d) 697, 121 A.L.R. 460.

Where a woman bought a lipstick from a retailer from which she suffered impairment of health by its use, an implied warranty of fitness and reliance was for the jury from the facts of the sale.

Smith v. Burdine's Inc. (Fla.), 198 So. 223.

So, in just about every conceivable sale of "personal property", there has been recovery allowed against the seller when there is a breach of implied warranty of fitness or merchantability. There are, of course, many cases to the contrary, too, but in the sale of such property which communicates a disease to the purchaser, the Courts are inclined to find breach of an implied warranty. Why is this so? Because the purchaser is not buying a "disease", and he who made the loss possible must suffer that loss.

The appellee says that there is no allegation of "scienter" or knowledge on its part of the existence of the disease in the parakeet, and that it does not impliedly warrant against something that it does not know about. The law is otherwise, however.

That one purchasing from a grocer a can of beans for food relies on the wisdom of the seller as to the

quality of the product is a necessary inference from the relation of the parties.

Ward v. Great At. & P. Tea Co. (Mass.), 120 N.E. 225.

So, too, in the sale of a parakeet.

The seller's knowledge of unfitness of an article sold need not be shown in action against him for damages for breach of implied warranty of fitness.

Bianchi v. Denholm (Mass.), 19 N.S. (2d) 697;

(See Propositions of Law XIV.)

The only use that the plaintiff, in this case, had for the parakeet was that of a pet or companion. The mere fact that she bought it, raised, by implication that it was reasonably fit for that purpose, that it was free of disease, that it could be consumed in that manner.

> "Sufficient information as to the particular purpose for which a garment is required, to raise an implied warranty within the Uniform Sales Act, arises from the fact that the purchaser wanted it for personal wear, tried it on, and obtained the alterations necessary to make it fit."
>
> *Flynn v. Bedell Co.* (Mass.), 136 N.E. 252.

It has been held that it is not necessary that the buyer, at the time he contracts or proposes to buy, state the purpose for which he requires the goods. If the seller, from the circumstances of the sale, acquires knowledge of the purpose of the goods, it is implied

that the seller warrants them to be reasonably fit for that purpose.

Manchester Liners v. Rea, 2 AC (Eng.) 74, 11 BRC 349.

She relied upon seller's skill and judgment that the bird was reasonably fit and clean for the purpose intended.

Buyer need not show express reliance upon seller's skill or judgment.

Kurriss v. Conrad & Co. (Mass.), 46 N.E. (2d) 12.

> "The fact that the defect in the article furnished rendering it unsuitable for the purpose contemplated could have been discovered by the buyer by a careful examination does not relieve the seller from liability on his warranty, if the buyer did not in fact have knowledge of the defect, and it was not so patent as to be unavoidably brought to his attention; for as has been said, the buyer is not bound to examine, because he has the right to rely upon the judgment of the seller, and to take it for granted the latter has furnished an article answering the terms of the contract."
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> 46 Am. Jur. Sec. 346, p. 532.

Perhaps one of the outstanding cases of breach of implied warranty, in appellant's opinion, is that of *Ringstad v. V. I. Magnin & Co.* (Wn. '52), 239 Pac. (2d) 848, in which the Court stated:

> "But the amended complaint was drafted with the intent to state a cause of action based upon a breach of an implied warranty of fitness, in re-

liance upon the uniform sales act and specifically Rem. Rev. Stat §5836-15 (1), which is as follows: '(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.'

Under that subsection there are two prerequisites to an implied warranty of fitness: First, the buyer must make known to the seller, expressly or by implication, the particular purpose for which the article is required; and second, the buyer must rely upon the seller's skill and judgment when he purchases the article. Cochran v. McDonald, 1945, 23 Wash. 2d 348, 161 P. 2d 305. It is obvious that an article of wearing apparel is to be worn, and that purpose must have been known to the seller. *The fact of the sale itself is sufficient to indicate that the seller knew the particular purpose, and thereby satisfies the first prerequisite.* (Italics ours.)

The amended complaint states that the buyer examined the robe '* * * for color, texture, size, style and design, but was totally and wholly uninformed as to the safety factor of the fabric from which the garment was manufactured and the resistance of said fabric to flame or fire; and said plaintiff (buyer, appellant) relied wholly and exclusively upon the defendant (seller, respondent) * * * to market merchandise which was fit for the purposes for which it was intended and safe for public use.'

That is a sufficient allegation of reliance by the buyer on the skill and judgment of the seller on an essential point fit for the required purpose. We therefore hold that the amended complaint sufficiently alleges the two prerequisites to a breach of warranty of fitness as set forth in Rem. Rev. Stat. §5836-15(1)."

* * * * * * *

"Many cases hold that reliance on the seller's skill and judgment may arise by implication from the facts in the case. As was held in Kurriss v. Conrad & Co., Inc., 1942, 312 Mass. 670, 682, 46 N.E. (2d) 12:

'The question is squarely presented whether the plaintiff, by implication, had a right to rely upon the expectation that she should not be sold a dress that contained some deleterious substance, not observable or discoverable upon reasonable examination by her, which would cause her injuries'.

We think it may be assumed that the defendant did not intend to sell and that the plaintiff did not intend to purchase such a garment. * * * Where, as in the case at bar, in a sale over the counter of an article that is open to inspection, but where any practicable inspection would not disclose an unsound condition, the plaintiff, by implication, has a right to rely upon the skill and judgment of the seller.' Quoted and approved in Payne v. R. H. White Co., supra (314 Mass. 63, 49 N.E. (2d) 426).

We hold in accordance with what we believe is the majority, and in any event the better, rule, i.e., that the implied warranty of fitness applies to retail sales of wearing apparel where the prerequisites of Rem. Rev. Stat. §5836-15(1) are met."

In endeavoring to impress the Court upon the merits of her lawsuit, appellant has tried to restrict the cases cited to those in which the subject of the sale has communicated a disease or an infection to the buyer after the sale. Extensive research has disclosed only one case which is in point, *Haut v. Kleene* (Ill., 1943), 50 N.E. (2d) 855, involving the sale of rabbits to plaintiff's wife resulting in her death by the contraction by her of the disease called "tularemia" or rabbit fever. The wife contracted the disease by the handling of the rabbits and not from the consumption of them with the family at mealtime. The Court stated:

> "Plaintiff brought an action against defendants under the Injuries Act to recover for the wrongful death of his wife charging that defendants were negligent in keeping and selling rabbits. Defendants denied liability and during the trial, by leave of court, plaintiff amended his complaint by charging that the rabbits purchased were intended for consumption by the general public and defendants knew they would be prepared for use as food and *thereby impliedly warranted* that the rabbits were 'free from injurious defects in the handling and consumption' of them; that the deceased as a result of handling and preparing the rabbits for food became afflicted with a disease known as tularemia or rabbit fever, from which she died. * * * The court on disposing of these motions entered the judgment appealed from in which it is recited that the matter came on to be heard on the motion of Amy Slad for judgment notwithstanding the verdict of the jury and 'after

arguments of counsel and due deliberation by the Court said motion is sustained as to the negligence and wilful and wanton counts and overruled as to the implied warranty count.' Continuing, the court overruled the motion for a new trial, entered judgment on the verdict against Amy Slad for $2,500 and also entered judgment on the verdict finding the other two defendants not guilty. Amy Slad appeals. The record discloses that on Friday, November 29, 1940, Charles Haut, husband of the deceased, who then lived at 1528 W. 29th Place, Chicago, went into the small retail store of defendant, Amy Slad, and purchased four rabbits from her. He testified that he asked Mrs. Slad if they were good, fresh rabbits and she said they were. There were about 100 skinned rabbits in the store and he had Mrs. Slad pick out four of them for which he paid $1.50; that he took them home, his wife washed them, cut them up in lengths, put them in a pail of vinegar, seasoning and carrots, and then into the ice-box; that she took them out on Sunday, cooked them and he and his family, consisting of himself, his wife and two daughters, ate the rabbits for dinner; that they were very good and they felt no ill effects from them. That about a week before he purchased the rabbits, his wife had cut her finger, that the Monday after they had eaten the rabbits she complained of headache and backache, the doctor was called, she was treated until December 6, 1940, when she was taken to the County Hospital, where she died December 16. The doctors who had treated her described the cut in her hand and gave as their opinion that she died as a result of tularemia, or rabbit poisoning."

Although the case of *Haut v. Kleene* was reversed because of an erroneous instruction, the Court held that defendant, Amy Slad could be held liable on breach of implied warranty on the sale of the rabbits, stating:

> *"But in any event, we are of the opinion that the issue can be submitted as against the defendant, Amy Slad without any confusion."* (Italics ours.)

The *Haut* case, supra, is direct authority for the rule when a seller sells an animal or a bird for human consumption, and such bird or animal is infected with a disease, there is liability on an implied warranty of fitness, even though the disease is contracted by the *handling* of the bird or animal, and the seller knows nothing about the condition of the bird or animal at the time of the sale.

Higbee v. Giant Food Shopping Center, Inc. (Va. '52), 106 Fed. Supp. 586, succinctly states the rule:

> "Logic will permit no distinction in this regard between articles to be consumed by the human body internally and those to be absorbed by it externally. *The law should be no less solicitous of the outside of man that of his inside. On rea*son, cosmetics ought to be included with food in any rule or doctrine of law adopted for the protection of the health and safety of the public. Congress has done so in the Federal Food, Drug, and Cosmetic Act. (Italics ours.)
>
> To say there is no dependence of the buyer upon the retailer if the subject of the sale is a sealed product of another, is to ignore the most potent factor of every trader's success—the confidence

and reliance of the public in him. Further, the retailer is not a mere conduit or an automaton in delivering products of another; he owes an obligation to his buyer. He is paid for assuming that obligation. While he cannot know what is in the package, neither can the buyer, and it is the seller who has brought the injurious article to the buyer. *Moreover, the seller has recourse against the producer, and is generally better enabled to enforce such recoupment than is the consumer to obtain recovery of the manufacturer. Public policy requires that the buyer be allowed to seek reimbursement from the retailer.*" (Italics ours.)

CONCLUSION.

It is respectfully submitted that appellant has stated a claim upon which relief can be granted on breach of implied warranty because:

1. The parakeet was purchased by her for only one purpose, to-wit, consumption or use as a pet and, quoting from *Grisinger v. Hubbard* (Ida.), 122 Pac. 853,

> "*Where personal property ordered by a purchaser is only fit for one purpose and cannot be intended for any other purpose except the one for which they are ordered, as in the case of nursery stock (or a parakeet), the seller will be presumed to have sold them for that purpose and warranted them to be fit and proper therefor.*" (Italics ours.)

2. The animal cases are of doubtful value as authorities when the loss to the buyer is "property dam-

age'' as distinguished from ''personal injury'' to the buyer.

3. ''Scienter'' is unnecessary where the seller sells an article inherently dangerous such as a diseased bird. In speaking of inherently dangerous articles Justice Cardozo, in *MacPherson v. Buick Motor Co.* (N.Y.), 111 N.E. 1050, set out the law:

> ''If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contact, the manufacturer of this thing of danger is under a duty to make it carefully * * *''

4. The buyer has the right to presume that a bird sold in a Five and Ten Cent Store is free of contagious disease and that it is presumed that she bought it for a pet, relying upon the seller's skill or judgment that it was reasonably fit for the purpose for which it was intended.

Dated, Boise, Idaho,
May, 1956.

Respectfully submitted,
WALTER M. OROS,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

IDAHO CODE.

"Sec. 64-115. Implied warranties of quality.—Subject to the provisions of this law and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are brought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

3. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." * * *

"Sec. 64-309. Acceptance does not bar action for damages.—In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods, the buyer

fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know such breach, the seller shall not be liable therefor."

"Sec. 64-507. Remedies for breach of warranty—1. Where there is a breach of warranty by the seller, the buyer may, at his election: * * *

b. Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty. * * *

6. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty." * * *

"Sec. 64-508. Remedies of buyer or seller—Interest and special damages.—Nothing in this law shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

Title 64-101 et seq at page 603, Idaho Code states:

"Compiler's notes. This act was adopted in Idaho 1919, ch. 149, p. 443, effective January 1, 1920, and is here given as adopted, a few minor changes due to clerical errors having been made to conform to the uniform draft.

A prior law on the subject of sales is found in R. C., pp. 3324-3331, reen. C. L., pp. 3324-3331, which was repealed by the law herein contained."